Supreme Court, U.S.
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NO. 92-1534

In The

Supreme Court of the United States

October Term, 1992

ANDREW L. SMITH,
Petitioner,

v.

R. JACK AYRES, JR.,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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April 21, 1993

ISSUE PRESENTED

Whether the Fifth Circuit correctly affirmed the district court's dismissal of Andrew Smith's derivative action for Smith Protective Services under Rule 10b-5 of the Securities and Exchange Commission for want of standing.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE UNITED STATES SUPREME COURT:

The Respondent R. JACK AYRES, JR., ("Ayres") respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari of Andrew L. Smith ("Andrew") seeking review of the decision of the United States Court of Appeals for the Fifth Circuit which is reported at 977 F.2d 946 (5th Cir. 1992).

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

This case is the remnant of the federal-court offshoot of a protracted, bitter intra-family dispute among Andrew, Coralie Smith, Andrew's mother, and Andrew's two brothers, Clayton and Mark Smith, over control of a family business, Smith Protective Services, Inc. (SPS)[1]. The petition represents Andrew's attempt to create federal jurisdiction for a derivative suit against Ayres, a Texas attorney who is a former general counsel for SPS.

Prior to March 1976, 100% of the stock ownership in SPS was held by Andrew's father (also named Andrew Smith), its founder, his wife, Coralie, and their three sons. In March 1976, the father died. Eventually his stock ownership in SPS passed through his estate to his widow Coralie and his three sons, but in September 1977, his stock was still held by his estate.

Prior to September 1977, Clayton was an officer, director, and shareholder of SPS. In 1977, Andrew, then President of SPS, accused Clayton of wrongfully taking corporate funds from SPS and had Ayres file suit for SPS against Clayton. In September 1977, Andrew personally negotiated a settlement of SPS's claims with Clayton under which Clayton would sell his SPS stock to SPS and resign all positions with SPS. Andrew, who was then and is now, a licensed attorney, drafted part of the documents reflecting the purported purchase by SPS. SPS's purported purchase of Clayton's stock was never formally ratified, authorized, or approved by the shareholders or directors of SPS. No stock certificates were issued, transferred, or signed over as part of the 1977 transaction involving Clayton's stock. Clayton, Andrew, Coralie and Mark signed the settlement documents in September 1977. However, no one signed the stock purchase agreements on behalf of the father's estate, and the estate was not a party to the purported transaction.

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[1] Andrew's statement of the case is riddled with inaccuracies and self-serving conclusions and statements. It is necessary to discuss the actual facts leading up to this suit to understand the decisions of the lower courts and to correct the inaccurate impressions left by Andrew's petition.

By 1983, Clayton had been rehired by SPS, promoted to vice-president and was a member of the board of directors. At that time, SPS had a nine-member board of directors consisting of Coralie, Andrew, Mark, Clayton and five non-family members who included Shelby Denny, who was then President of SPS, and Ira Tobolowsky. Tobolowsky, a licensed attorney and a close friend of Andrew, was also chairman of the SPS Litigation Committee, which oversaw litigation and coordinated litigation and potential litigation matters involving SPS with Ayres.

Clayton approached Denny about having the purported September 1977 purchase of his stock by SPS rescinded on the grounds that it had never actually been properly concluded and was a nullity or, alternatively, on the ground that it had been fraudulently induced by Andrew. Clayton contended that Andrew, who had served in the capacity of an attorney for SPS, Clayton, and other members of the Smith family, had breached his fiduciary duties to Clayton in the prior transaction. By letter dated May 5, 1983, Clayton personally made demand that Andrew, Coralie, and Mark return his SPS stock to him.

Denny referred Clayton to Ayres, as general counsel for SPS, and to Tobolowsky, as an SPS director and head of the SPS Litigation Committee. Clayton also made demand upon Ayres and Tobolowsky for the return of his stock in SPS which had been the subject matter of the September 1977 purported stock purchase. Ayres suggested that Clayton hire an attorney to present his claims to SPS. Clayton retained Gerry Wren, a Dallas attorney recommended independently by both Ayres and Tobolowsky, to represent him in connection with his claims against SPS. On behalf of Clayton, Wren contacted both Ayres and Tobolowsky. During these contacts, Wren orally set forth the nature and substance of the claims and demands being asserted by Clayton against SPS. One of the demands which Clayton was making on SPS in July 1983 was for the rescission or cancellation of the purported September 1977 stock purchase and the return to Clayton of his stock in SPS. Wren orally asserted this demand on behalf of Clayton to Ayres and

Tobolowsky. Wren further asserted the urgency of having SPS act quickly upon Clayton's claims in order to avoid litigation.

Wren was advised that Clayton's claims would be presented to SPS's Board of Directors for consideration at a meeting scheduled for July 22, 1983. Wren agreed to provide, at the request of Tobolowsky and Ayres, a letter prior to the July 22, 1983 directors meeting which would set forth in writing the reasons for Clayton's demand that the September 1977 purported stock purchase be rescinded. The purpose of this demand letter was to enable the SPS Board of Directors to have Clayton's claims and demands reduced to writing so that SPS's board could consider those claims and demands at its scheduled meeting.

Prior to noon on July 22, 1983, Tobolowsky contacted Ayres and advised him that no demand letter had been received from Wren. Tobolowsky was concerned that if no demand letter was received, the Board of Directors would have nothing in writing regarding Clayton's claims to take up at the scheduled Board of Directors meeting later that day. Tobolowsky was also concerned that Wren might get in trouble with Clayton for failure to deliver the promised letter on time. Therefore, Tobolowsky initiated a conference call with Ayres to Wren's offices to inquire as to the status of the demand letter.

Ayres and Tobolowsky were advised in that call by Wren's legal assistant, Donna DeLozier, that Wren had not yet prepared the demand letter, that Wren was at that time out of the office, and that Wren was out of contact with his office. During this telephone conference, Tobolowsky, acting as a member of the SPS Board of Directors and as chairman of the SPS Litigation Committee, directed Ayres, as general counsel for SPS, to supply Wren's legal assistant with language setting out the substance of Clayton's claims and demands. The purpose of supplying such language to Wren's legal assistant was so that she could prepare the requested demand letter on Wren's behalf.

At Tobolowsky's direction and with him listening, Ayres provided to Wren's legal assistant the language to use in preparing the requested demand letter. When Tobolowsky was informed later that the dictation equipment at Wren's office

failed, he made a second call to Ayres and had Ayres redictate the language while Tobolowsky again listened in. On both occasions, Tobolowsky was not only fully aware of Ayres providing such language to Wren's legal assistant, but also assisted in supplying such language. There is no dispute that the language supplied by Ayres accurately set forth the oral demands which had previously been made to Ayres and Tobolowsky by Wren on Clayton's behalf. Wren himself subsequently reviewed and approved the letter and its language before it was hand-delivered to the SPS Board of Directors.

Meanwhile, Mark and several non-family members of the Board met prior to the SPS board meeting to discuss their views of Clayton's demands. They informally agreed that Clayton should have his SPS stock back.

When the matter of Clayton's claims was reached by the Board of Directors at the July 22, 1983 meeting, Clayton excused himself from the meeting. Wren's letter was provided to the Board to set forth the substance of Clayton's claims and demands. Ayres gave his opinions and advice to the Board, and Andrew gave his opposing opinions and view of Clayton's claims. The Board voted 5 to 2 with two abstentions (one being Clayton) to rescind the purported 1977 purchase of Clayton's stock by SPS. Andrew and Coralie voted against the resolution.

As a result of this Board action, SPS's books reflected that Clayton, Mark and Andrew each held 26% of the outstanding SPS stock and Coralie held 22%. Clayton and Mark subsequently voted together to effectively control SPS's management and Clayton became the President of SPS. Clayton subsequently directed Ayres to sue Andrew as a conspirator in a pending Texas state-court lawsuit against other family members for attempting to appropriate trademarks belonging to SPS. In response, Andrew filed counterclaims in the state-court suit seeking to set aside the Board of Directors' rescission of SPS's purported 1977 purchase of Clayton's stock. Complex state litigation followed between the Smith family members.

While the state-court cases were pending, Andrew filed this suit in federal court on December 31, 1985 against Clayton,

Mark and Ayres. He alleged a personal claim and a derivative action for SPS against Ayres and his brothers for violating Rule 10b-5 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68 ("RICO").

The district court originally dismissed Andrew's complaint on the grounds that he failed to state a claim for himself and that a state-court judgment which deprived Andrew of his ownership of SPS stock defeated his standing to bring a derivative action on behalf of SPS. On appeal, the Fifth Circuit affirmed the dismissal of Andrew's federal claims except for the derivative action for SPS against Ayres. *Smith v. Ayres*, 845 F.2d 1360 (5th Cir. 1988). Because the state-court judgment had later been reversed by the Texas Court of Appeals, the Fifth Circuit remanded the derivative action against Ayres for further consideration.

Andrew's derivative suit is predicated entirely upon Ayres' actions in supplying language for the July 22, 1983 demand letter ("the Wren letter"). Andrew has alleged that the assertion of Gerry Wren's authorship of the Wren letter is a prohibited false or misleading act or practice under Rule 10b-5, notwithstanding the fact that Wren approved the letter prior to its delivery to SPS and notwithstanding the fact that the Wren letter accurately set forth the claims and demands then actually being made by Clayton against SPS.

Andrew asserts that on the basis of this alleged false assertion of authorship, rather than the substance of Clayton's claims themselves, the SPS Board of Directors voted to rescind the abortive 1977 purchase by SPS of Clayton's SPS stock and to return Clayton's SPS stock to him. The principal damaging effect of this transaction to SPS, according to Andrew, is that it transferred effective control of the stock of SPS from Andrew and his mother (and family ally) Coralie, to a rival family block consisting of Andrew's brothers, Clayton and Mark, whom Andrew alleges mismanaged the corporation and brought about lost value and lost profits to SPS.

Following the remand of this case, Andrew and Coralie entered into a settlement of all their claims against SPS, Clayton

and Mark on or about December 19, 1989. In that settlement, SPS purchased all of Coralie's SPS stock and also all of Andrew's stock, allegedly except for "one share." At the conclusion of the settlement, the only shareholders in SPS (other than the "one share" allegedly held temporarily by Andrew under the settlement agreement) were Mark and Clayton. The sole purpose of Andrew's purported retention of "one share" was to enable him to continue the derivative suit against Ayres.

The settlement documents executed by Coralie, Andrew, Clayton, Mark and SPS provided:

> Smith Protective Services, Inc. shall have an option to purchase the remaining share from Andrew L. Smith for 1 cent, said option to be exercisable upon the final judgment or date it is determined, under Texas and federal law, that ownership of said share is unnecessary to maintain the said derivative suit. Andrew L. Smith agrees to bring no other derivative suits and to not exercise any shareholder's rights pursuant to the ownership of this single share other than the continuation of the existing derivative suit against R. Jack Ayres, Jr.

It would be difficult to imagine a more blatant attempt to artificially manufacture federal standing and jurisdiction than that which Andrew has attempted in this case through the use of the state-court settlement. There are presently ten million shares of SPS stock authorized, each with a par value of 1 cent per share. Andrew's "one share," even if valid, therefore, represents 1/10,000,000 or 0.0000001% of the total ownership of SPS.

The settlement documents also assigned to Andrew any of SPS's claims or causes of action against Ayres including the right to substitute SPS's name for Andrew's in the federal derivative suit. Prior to that settlement, however, on May 24, 1989 and May 31, 1989, the Board of Directors of SPS, after the filing of this suit and with full knowledge of Ayres' role in supplying language for the Wren letter,[2] unanimously ratified and approved the 1983 rescission of the September 1977 pur-

ported purchase of Clayton's SPS stock. The Board of Directors at the time of the ratification consisted of Clayton, Mark and Bill Cue, all of whom were also directors at the time of the July 22, 1983 board meeting.

Despite such developments in the state litigation, Andrew never amended his pleadings in this case following the remand from the Fifth Circuit. The sole jurisdictional basis alleged is his Rule 10b-5 derivative suit on behalf of SPS against Ayres. Under Andrew's current pleadings, the damages alleged by Andrew on behalf of SPS are due to the alleged mismanagement of SPS by Clayton and Mark after they took control of SPS. Under the state-litigation settlement agreement, however, Andrew's one share of stock does not entitle him to the ordinary rights of stock ownership, including the right to share in any proceeds to SPS from this litigation.[3]

Under the current pleadings of this case, therefore, the only persons who would profit from a recovery by SPS of damages which Andrew alleges that SPS has suffered would be the very people -- Mark and Clayton -- whom Andrew alleges caused the damages and toward whom Andrew has demonstrated

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[2] Ira Tobalowsky testified that he told other directors, including Coralie and Mark, about Ayres' role in supplying language for use in preparing the July 22, 1983 demand letter within a month after the July 22, 1983 Board meeting. Andrew himself has alleged that in January 1984, he became aware of Ayres' role in supplying language for use in preparing the demand letter, and that he advised the officers and directors of SPS of these facts. (Plaintiff's Second Amended Complaint.)

[3] Andrew's right to share in the proceeds of this litigation would exist, if at all, only to the extent that the purported assignment validly assigns SPS's claims to Andrew. Apart from the assignment, Andrew would have no right, solely on the basis of his "shareholder" status, to participate in any SPS recovery in this case.

open hostility.[4] In short, Andrew has no economic stake or incentive in the outcome of this lawsuit as pled.

Why then would Andrew go to such elaborate lengths to try to keep this derivative suit against Ayres alive or from collapsing under the weight of the state-court settlement? Aside from the open hostility between Andrew and his brothers,[5] there are two readily apparent reasons demonstrated from the record in this case, neither of which have anything to do with SPS, but both of which are instead personal to Andrew.

First, it would be difficult to underestimate Andrew's personal hostility toward Ayres. Andrew's comments about Clayton are rather mild compared to his comments about Ayres. Under oath, Andrew has testified that Ayres is "possessed by some satanic spirit," has "psychological problems," is "probably insane," has "gone off on . . . grand delusions," "if there's anybody in the world who is [possessed by satanic spirits], that Mr. Ayres is just about as bad a person," "like Adolph Hitler, he thinks he can do anything," has "got the Midas touch syndrome," "is evil," and "is by far the most evil doer I have ever experienced so far in my life." Andrew, in short, wants to continue this litigation putatively "on behalf of SPS" but, in fact, simply as a continuation of his personal vendetta against Ayres. The Fifth Circuit points out that Andrew's brief, before it was "peppered with vituperative epithets, pugilistic, metaphors, and descriptions of Ayres as 'satanic' and 'evil'." 977 F.2d at 949.

Secondly, Andrew figures in yet another titanic struggle for the control of a business with which the federal courts and Texas state courts are painfully familiar: the *Browning v. Holloway* dispute in which Ayres has long served as an attorney for the

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[4] Andrew has sworn under oath that Clayton is a "sociopath" and is either "insane or possessed by satanic spirits." He has characterized Mark as "just a weak individual."

[5] Allowing Andrew to continue with this lawsuit would allow him to keep the proceeds of the state-court settlement with SPS based upon mismanagement and other misdeeds by Clayton and Mark, and yet still continue to embarrass his brothers by continuing to make those same allegations within the context of this suit.

Browning family interests.[6] Andrew has served as an attorney for and assisted Pat Holloway and/or his wife, Robbie Holloway, in several of the Holloway's never-ending series of lawsuits against the Brownings and anyone else connected with that litigation in any capacity (including judges and attorneys). Andrew makes no effort to hide his desire to use this case as a vehicle for advancing his personal agenda in the Holloway litigation. In connection with that representation, Andrew has testified under oath:

> I decided, you know, since, you know [Ayres] was going to ruin five years of my life that *I'm going to ruin ten of his*, because I'm going to be sure that Pat Holloway prevails. And anybody who would just spitefully try to put one on me like this, it's not going to be over with until it's over with. And he -- if he thinks this is even the end of the tenth round, I mean we're -- *we're not even finished with the first round.* (original emphasis).

Hence, Andrew has the incentive of using this litigation to harass Ayres to try to gain additional concessions in the Holloway litigation, or to use this suit as leverage in the Holloway litigation. *See Smith v. Ayres*, 977 F.2d at 949.

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[6] See, e.g., *Holloway v. Starnes*, 840 S.W.2d 14 (Tex. App. - Dallas 1992, writ denied); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. - Dallas 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. - Dallas 1988) (orig. proceeding), *rev'd, Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. - Dallas 1984), *dism'l reinstated*, 690 S.W.2d 321 (Tex. App. - Dallas 1985, writ ref'd n.r.e.)(en banc), *cert. denied*, 574 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed. 2d 602 (1986); *Browning v. Navarro*, F.2d 377 5th Cir. 1991); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989), *reh'g denied*, 894 F.2d 99 (5th Cir. 1990); *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984), rev'g *Browning v. Navarro* 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Walker*, 784 F.2d 1287 (5th Cir. 1986), *reh'g denied*, 790 F.2d 1170, *cert. denied*. 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed. 2d 576 (1986); *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986) (Bolivian consul matter); *Holloway v. Walker*, 811 F.2d 236 (5th Cir. 1987) (sanctions); *In re Holloway*, No. 91-1541 (5th Cir. Jan. 27, 1992) (bankruptcy appeal); *Flojo Trading Corp. v. Browning*, No. 3-91-256-Cv (Tex. App.-Austin July 1, 1992, no writ); *Jachne v. Starnes*, No. 14,693 (Tex. App.-Austin September 23, 1987, writ ref'd n.r.e.).

When the district court had originally dismissed this case, it had not considered all of Ayres' arguments. Therefore, following the remand, Ayres renewed the unaddressed arguments and added Andrew's lack of standing to pursue a derivative suit by having sold his SPS stock, except for his alleged retention of "one share." Ayres alternatively moved for summary judgment. In opposition, Andrew contended that as an "owner" of "one share" of SPS stock, he represented all similar shareholders - i.e., himself. Andrew also argued in the alternative that he had standing to sue as an assignee of SPS. The district court granted Ayres' Motion to Dismiss, and the Fifth Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. ANDREW LACKS STANDING TO REVIEW ISSUES NOT ALLEGED IN HIS COMPLAINT.

Andrew's only live complaint at the time the district court dismissed this case for the second time was one simple allegation - a Rule 10b-5 derivative suit for SPS. Andrew never amended his complaint to allege standing as an assignee of SPS. Ayres pointed out that deficiency to the lower courts. While both the lower courts also addressed Andrew's assignee claims, the central focus was on Andrew's standing to pursue a derivative suit as an "owner" of "one share" of SPS's 10,000,000 shares.

The issues Andrew asks this Court to address have nothing to do with the only remaining allegations actually contained in this complaint. Because federal courts are courts of limited jurisdiction, Andrew as the plaintiff had the burden to establish that jurisdiction in his complaint. Because he failed to do so, he has not preserved for review the issues he seeks to present to this Court.

II. THIS CASE TURNS ON ITS OWN FACTS AND WILL AFFECT FEW OTHERS THAN THE LITIGANTS.

Neither of the courts below sought to enunciate any significant ruling to control regular shareholder derivative suits or Rule 10b-5 suits. Both courts focused on the narrow facts involving the protracted internecine feud between Andrew and his brothers, as well as Andrew's "virulent antagonism" towards Ayres.

Andrew's so-called retained "ownership" of "one share" of SPS stock is a transparent sham transaction executed solely to attempt to manufacture federal jurisdiction. As such, his suit is barred by 28 U.S.C. §1359. Andrew never addresses this fraud in his petition. The decisions of the lower courts concern the right of a person who retains "ownership" in name only of one share out of 10,000,000 shares in a family-owned company for the express purpose of creating standing to bring a derivative suit purportedly on behalf of the corporation, when he is, in fact, openly antagonistic to the real owners of the company. Obviously, the rulings in this case are not going to apply to many, if any, other litigants. Indeed, Andrew himself recognizes that the decisions below are fact sensitive and fact determinative.

The lower court's analysis of Andrew's purported assigned claims was likewise restricted to this particular factual situation. The Fifth Circuit specifically held:

> We need not resolve and *reserve for another day whether under other circumstances*, some Rule 10b-5 claims may be expressly assigned. In this case, however, the trial court did not err in dismissing the claim based upon the purported assignment of the Rule 10b-5 action where the assignment appeared to have been made for the purpose of creating standing and pursing a vexatious lawsuit.

977 F.2d at 950-51 (emphasis added).

III. THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT AND THIS COURT OR OTHER COURTS OF APPEALS.

Not once in his petition does Andrew show how the Fifth Circuit's opinion is in conflict with a prior opinion of this Court. In fact, in its opinion, the Fifth Circuit specifically focuses upon the policy considerations addressed at great length by this Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed 2d 539 (1975). The Fifth Circuit then applies those policy considerations to the unique facts of this case. Thus, the Fifth Circuit's opinion is clearly consistent with, rather than in conflict with, this Court's *Blue Chip Stamps* opinion.

Andrew also fails to show a real conflict between the Fifth Circuit and other circuits on the same matter of law or fact; rather, he merely identifies inconsistencies in dicta or in the general principles utilized. The closest potential conflict Andrew cites is *Lowry v. Baltimore & Ohio R.R. Co.*, 707 F.2d 721 (3rd Cir.)(en banc), *cert. denied*, 464 U.S. 893, 104 S.Ct. 238, 78 L.Ed. 2d 229 (1983). In *Lowry* a badly divided court issued a per curiam opinion accompanied by five separate opinions of various members of the court. In their various opinions, a majority opined in dicta that an express assignment does not violate the philosophy of *Blue Chip Stamps*. No definitive holding to this effect was actually made by the *Lowry* court. Moreover, the factual situations in *Lowry* did not involve transactions intended for the sole purpose of fraudulently conferring federal jurisdiction. Hence, *Lowry* and this case are clearly distinguishable.

In *Blue Chip Stamps*, this Court noted its history of permitting the lower courts to thoroughly analyze the applicability of 10b-5 claims before addressing such issues itself. 421 U.S. at 730-31, 95 S.Ct. at 1922-23. Such an approach provides this Court with the benefit of the wisdom and intellect of many experienced judges. Andrew now asks this Court to address his issues without the benefit of such prior analysis. Such issues are not ripened in this case to an appropriate stage for this Court's review.

IV. THE FIFTH CIRCUIT DID NOT DENY ANDREW ANY RIGHT TO A MEANINGFUL APPEAL.

Andrew also asks this Court to grant certiorari on the premise that the Fifth Circuit has somehow denied him a meaningful review of the district court's dismissal of his case. He complains mightily but vaguely about the Fifth Circuit's analysis of the policy considerations expressed by this Court in *Blue Chip Stamps* and their application to the jurisdictional facts in this case. In essence, Andrew contends that the Fifth Circuit's analysis of the law must not deviate from the analysis of the district court or the arguments presented by Ayres. Such a contention is preposterous. It is well established that a court of appeals can affirm a correct decision of a district court for even a completely different reason than that given by the district court. *Riley v. Commissioner*, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940).

Moreover, Andrew had ample notice that he needed to address the policy considerations espoused in *Blue Chip Stamps*. In his supplemental motion to dismiss and brief in the district court, Ayres devoted the bulk of his argument to Andrew's lack of standing as a stockholder because that was the only basis for jurisdiction in Andrew's alleged derivative suit. In the event that Andrew might seek to amend his complaint in light of his state-litigation settlement, Ayres also addressed Andrew's standing as an assignee. Ayres specifically identified this Court's writing in *Blue Chip Stamps* "about the sound policy reasons for carefully restricting the class of 10b-5 plaintiffs to purchasers and sellers." Ayres then argued that the assignment of 10b-5 claims are particularly inappropriate where the assignment is made solely to attempt to create standing to a non-qualified 10b-5 plaintiff. Ayres repeated this same argument to the Fifth Circuit in his brief while at the same time pointing out Andrew's personal hostility towards Ayres, his conflicts with his brothers, the current owners of SPS who Andrew claims damaged SPS through mismanagement, as well as the utter frivolousness of Andrew's claims against Ayres for acting under the direction of the Chairman of the SPS Litigation

Committee. Andrew had ample opportunity to address the applicability of the *Blue Chip Stamps* policies to the facts of this case before the Fifth Circuit. There is no reason to burden this Court with what would be a simple review of a lower court's analysis.

V. ANDREW'S PENDENT STATE CLAIMS PROVIDE NO BASIS FOR THIS COURT'S REVIEW.

Finally, Andrew complains that the lower courts erred by not readdressing his pendent state-court claims which had been dismissed without prejudice in the district court's original dismissal. In Andrew's first appeal, the Fifth Circuit reversed only the district court's dismissal of Andrew's derivative action for SPS against Ayres. *Smith v. Ayres*, 845 F.2d at 1365. The remainder of the district court's decision was affirmed. 845 F.2d at 1364-66. By his third issue, Andrew seeks in this second appeal to request a review of the Fifth Circuit's decision in the prior appeal. His request is untimely; such a review should have been sought in the first appeal.

Even if Andrew's pendent state claims were somehow automatically resurrected by its Fifth Circuit's reversal of one narrow federal claim, the courts below were not required to continue to entertain such claims when they decided that last remaining basis for federal jurisdiction had ended. See 28 U.S.C. §1367(c)(3); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed. 2d 218 (1966).

Andrew acknowledges that his state law claims against Ayres are now barred by Texas rules of limitations. Andrew has only himself to blame. He could have avoided this result by timely filing a state court suit against Ayres within sixty (60) days following the district court's original dismissal of his federal claims. Tex. Civ. Prac. & Rem. Code §16.064. This Court cannot be expected to grant certiorari in a case of this type for the sole purpose of enabling Andrew to avoid the applicable rules of limitations. See *Reed v. Allen*, 286 U.S. 191,198-99, 52 S.Ct. 532,533,76 L.Ed. 1054 (1932).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1993, three copies of Respondent's Brief in Opposition were mailed, postage prepaid, to Mr. F. Dean Armstrong, Law Offices of F. Dean Armstrong, P.C., 639 Perth Avenue, Flossmoor, Illinois 60422. I further certify that all parties required to be served have been served.

EDWIN E. WRIGHT, III